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SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1932.

No. 785

JOHN W. KOEHRMAN, APPELLANT,

vs.

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED BY THE PLAINTIFF IN ERROR (APPELLANT) THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF OHIO, AS REQUIRED BY RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

Pursuant to paragraph 1, Rule 12, of the Supreme Court of the United States, plaintiff in error, John W.

Koehrman (appellant), presents and files this, his statement particularly disclosing the basis upon which it is contended by him that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Ohio desired to be appealed from:

A.

Statutory Provision Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States on appeal is the Act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 937; Jud. Code, Sec. 237; 28 U. S. C. A., Sec. 344), which provides that:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."
>
> * * * * * * *

as modified by the Act of January 31, 1928, c. 14, Secs. 1 and 2 (45 Stat. 54), as amended April 26, 1928, c.

440, 45 Stat. 466 (28 U. S. C. A., Sec. 861*a* and 861*b*), which respectively provide:

> SEC. 861*a*. "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."
>
> SEC. 861*b*. "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

Statutes of the State of Ohio the Validity of Which is Involved.

The statutes of the State of Ohio the validity of which is involved are Ohio General Code, Sections 11497, 11503, 11510, 11511, 11512, and 11514, Vol. 3, The General Code of Ohio, 1910, pages 2465 to 2468, inclusive (Page's Annotated Ohio General Code, Vol. 2, pages 4732, 4735 to 4738; The Complete Ohio General Code, Page's Desk Ed., 1932, pages 2528, 2529; Throckmorton's Annotated Code of Ohio, 1929, pages 2890 to 2893). These sections provide as follows:

> "SEC. 11497. *Corporations; Officers May Be Examined.*—At the instance of the adverse party, a party may be examined as if under cross-examination, either orally, or by deposition, like any other witness. If the party be a

corporation, any or all the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded, but may rebut it by counter testimony." (101 v. 139.)

"SEC. 11503. *What Subpœna to Contain.*—A subpœna shall be directed to a person named therein, and require him to attend at a specified time and place to testify as a witness. It also may direct the person it names to bring with him any book, writing, or other thing under his control, which he may be compelled to produce as evidence." (51 v. 57, Sec. 317.)

"SEC. 11510. *Contempt of Court.*—Disobedience of a subpœna, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal to answer as a witness or to subscribe a deposition, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required." (51 v. 57, Sec. 322.)

"SEC. 11511. *When Attachment May Issue.*—When a witness fails to obey a subpœna personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, an attachment, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his appearance, which sum shall be indorsed on the

back of the writ, except that, if no sum be so indorsed, it shall be one hundred dollars. When the witness was not personally served, the court, by a rule, may order him to show cause why an attachment should not issue against him." (51 v. 57, Sec. 323.)

"SEC. 11512. *Punishment for Contempt.*—Punishment for the acts of contempt specified in section eleven thousand five hundred and ten shall be as follows: When the witness fails to attend in obedience to a subpœna, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition." (77 v. 42, 45.)

"SEC. 11514. *How Witness Released from Imprisonment.*—A witness so imprisoned by an officer may apply to a judge of the supreme court, court of appeals, common pleas or probate court, who may discharge him, if it appears that his imprisonment is illegal." (103 v. 405, 426.)

C.

Date of Judgment Sought to be Reviewed and Date of Presentation of Application for Appeal.

The judgment of the Supreme Court of Ohio desired to be appealed from was entered on the 25th day of January, 1933, and the application for appeal is presented and filed this 10th day of February, 1933.

D.

Nature of Case and Rulings of the Supreme Court of Ohio.

This is a suit involving questions under the Federal Constitution as to the right of a State to empower notaries public to imprison witnesses without judicial hearing or sanction. The action was begun in the Court of Appeals of Lucas County, Ohio, by plaintiff in error, John W. Koehrman, as petitioner, against the sheriff of Lucas County, Ohio, as respondent, to obtain petitioner's discharge from the custody of said sheriff. Petitioner had been arrested and attached to answer to a notary public for contempt in failing to appear to give his testimony and to produce certain documentary evidence in the course of taking depositions for use in a civil action pending in the Court of Common Pleas of Lucas County, Ohio.

Petitioner was granted a writ of habeas corpus by the Court of Appeals for Lucas County, Ohio, which released petitioner on bail. On final hearing that court discharged the writ and remanded petitioner to the custody of the sheriff. Proceedings in error were filed and heard in the Supreme Court of Ohio, which affirmed the lower court, holding as hereinafter set forth.

In ordering the arrest and attachment of the petitioner the notary public purported to act under the Ohio General Code, Sections 11497, 11503, 11510 to 11512, inclusive, above quoted.

Under these sections as construed by the Supreme Court of Ohio, the notary *should* require a witness to

answer only questions and produce only documentary evidence which are "pertinent to the issues tendered or made" and "in cases and under circumstances where a party might heretofore have been compelled to produce the same by the ordinary rules of proceedings in chancery". *Ex Parte Jennings*, 60 O. S. 319 (1899); *Ex Parte Schoepf*, 74 O. S. 1 (1906) (syllabus). But the notary, who is a mere "ministerial" or "executive" officer, has the *power* to order the imprisonment of a witness for refusal to answer incompetent, irrelevant or immaterial questions and for the refusal to produce wholly incompetent, irrelevant or immaterial documentary evidence. The witness may disobey such order only at his peril. *The notary public is not vested with power or jurisdiction to hear and determine any questions as to the competency, relevancy or materiality of any evidence*, and may, *without determining any of these questions*, order a witness to be committed to jail until he answers. No opportunity is afforded by the Ohio statutes for *judicial review* of any such order *prior* to imprisonment. *De Camp* v. *Archibald*, 50 O. S. 618 (1893); *Ex Parte Jennings*, 60 O. S. 319 (1899); *In re Rauh*, 65 O. S. 128 (1901); *Ex Parte Schoepf*, 74 O. S. 1 (1906). See also the opinion of the court in the instant case.

It thus appears that the question as to whether petitioner should be imprisoned is by the laws of Ohio left to the uncontrolled will of a ministerial or executive officer, who has neither power nor authority to determine what would be a proper exercise of his statu-

tory power and whose decision to imprison or not to imprison depends upon nothing but his mere will.

The record in the instant case shows that when the petitioner was ordered to be taken into the custody of the respondent to answer to the notary public for his alleged contempt, the notary public did not hold any hearing, hear any arguments, give the petitioner or his counsel any notice or opportunity to be heard, but that *in the absence of petitioner and his counsel* the notary signed and issued the order of attachment, which had been prepared and was presented to him by counsel for the party seeking to take the deposition.

It further appears that the particular notary public in the case at bar would have been disqualified to adjudicate, if he had authority so to do, by reason of the fact that he was selected and employed by, and the continuance of his employment was at the will of, the party seeking to take the deposition, and the amount of his compensation was directly dependent upon the length of the deposition and the number of writings to be copied therein.

Petitioner maintained, and now maintains, that the above sections of the Ohio statutes and the operation thereof under the facts of this case are unconstitutional and void, and that he has been by the authority of the State of Ohio deprived of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

There is further involved in this case the question whether the purported subpœna *duces tecum* issued by the notary and served upon the petitioner was illegal and void and constituted an unreasonable search and

seizure in violation of the Fourteenth Amendment to the Constitution of the United States.

In determining the questions presented the rulings of the Supreme Court of Ohio, as expressed in the syllabus of the court, which under Rule VI of the Supreme Court of Ohio states the points of law decided, were as follows:

> "1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpœna.
>
> "2. The general assembly did not violate any provision of the federal or state constitution in the enactment of Sections 11510, 11511 and 11512, General Code, in delegating such power to notaries public. *DeCamp* v. *Archibald*, 50 Ohio St. 618, and *Benckenstein* v. *Schott*, 92 Ohio St. 29, approved and followed.
>
> "3. A witness committed by a notary public, under Sections 11510, 11511 and 11512, General Code, has his remedy under Section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross-examination under the statute, the further right to test the relevancy or competency of the questions and to demand his privilege is preserved to him in the trial court.
>
> * * * * * * *
>
> "6. The claim that a notary public has such an interest in the taking of depositions as dis-

qualifies him to act, is untenable, and the case of *Tumey* v. *Ohio*, 273 U. S. 510, has no application whatever.

"7. In an action charging fraudulent conspiracy by the officers of a corporation, because of the tendency toward liberality in cases of this character, the range of the testimony is wide and subpœnas *duces tecum*, which command that the entire correspondence file, records and documents of such corporation for many years back be produced before the notary public by the officers of the corporation, to be used in connection with the giving of their depositions as upon cross-examination, are not so broad and sweeping as to be violative of due process, and do not constitute unreasonable searches and seizures."

E.

Cases Believed to Sustain Jurisdiction.

The following decisions of the Supreme Court of the United States are believed to sustain the jurisdiction on appeal of the Supreme Court of the United States:

Weston et al. v. *The City Council of Charleston*, 2 Pet. 449, 464 (1829).

Tinsley v. *Anderson*, 171 U. S. 101, 105 (1898).

Bryant v. *Zimmerman*, 278 U. S. 63, 70 (1928).

Tumey v. *Ohio*, 273 U. S. 510 (1927).

In addition, attention is invited to the memorandum opinion of the United States Circuit Court of Appeals for the Sixth Circuit in the case of *In the Matter of C. N. Bevan, on Habeas Corpus*, in which the court said:

"If the Supreme Court of Ohio should decide the case (the instant case) presented to it adversely to appellant's contention, it is open to them to seek a review of its decisions by the Supreme Court of the United States."

Respectfully submitted,

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CRARY DAVIS,
Attorneys for Petitioner.

STUART S. WALL,
THOMAS J. LYNCH,
HARRY S. BUGBEE,
Of Counsel.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 785

JOHN W. KOEHRMAN, APPELLANT,

vs.

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO.

APPELLEE'S STATEMENT MAKING AGAINST THE JURISDICTION ASSERTED BY THE APPELLANT.

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RAYMOND T. JACKSON,
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JOHN C. MORLEY,
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Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 785

JOHN W. KOEHRMAN, APPELLANT,

vs.

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO.

APPELLEE'S STATEMENT MAKING AGAINST THE JURISDICTION ASSERTED BY THE APPELLANT.

Nature of the Case.

This is an appeal from a final judgment of the Supreme Court of Ohio, which held that the appellant had been lawfully attached to answer for an alleged contempt. The appellant, who had been personally served with a subpœna *duces tecum* to appear before a notary public and give his testimony in a civil suit pending in the Common Pleas Court of Lucas County, Ohio, was attached for his disregard of and refusal to appear,

while making no claim of privilege, in response to such subpœna. The writ of attachment, issued by the notary pursuant to Section 11511, Ohio General Code, commanded the sheriff to attach the appellant and bring him before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpœna as to give his testimony in the action" (R. 105-106).* The appellant, as hereinafter appears, prevented the sheriff from bringing him before the examining officer for hearing as to whether his disobedience of the subpœna constituted contempt by precipitate and untimely resort to the courts.

The testimony of the appellant was sought to be taken before a notary public, under the following statutory scheme of the State of Ohio for taking testimony by deposition in civil cases. For the convenience of the Court the pertinent sections of the Ohio General Code are printed in full in Appendix A hereof.

Section 11521** provides that the testimony of witnesses may be taken in any civil proceeding by deposition or oral examination. Section 11526 provides that "either party may commence taking *testimony* by deposition at any time after service upon the defendant." Section 11534 requires that notice of the taking of the deposition be given to the adverse party. Sec-

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* All references to the record are to pages of the transcript in manuscript form.

** All statutory references throughout this statement, unless otherwise indicated, are to sections of the Ohio General Code.

tion 11535 prescribes the manner of notice and provides that the deposition shall only be used against such parties as shall have been given such notice. Section 11525 provides that such deposition shall not be used at the time of trial unless the witness is then absent, dead or infirm, or where the oral examination of the witness is not required. Section 11529 enumerates the officers authorized to take depositions and includes, among others, notary publics and judges. Sections 11502, 11503 and 11504 provide for the issuance, form and service of subpœnas and subpœnas *duces tecum*. This in brief and so far as deemed material is the legislative scheme for the taking of testimony by deposition in civil cases in Ohio.

Sections 11510, 11511 and 11512 provide for the enforcement of this method of taking testimony in civil cases in Ohio. In passing it may be noted that these sections also cover the compulsion of oral testimony in open court. Section 11510 defines contempt as (1) disobedience of a subpœna; (2) refusal to be sworn; and (3) unlawful refusal to answer as a witness. The section also provides that any such disobedience "may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required." The last two species of contempt are necessarily committed in the presence of the examining magistrate and the statute authorizes their punishment without further citation or hearing. The contempt defined as disobedience of a subpœna is not committed in the presence of the examining magistrate; and Section 11511 provides that if the witness has been *personally*

served, the examining magistrate may issue an attachment to bring the intended witness before the magistrate to answer for his contempt as well as to give testimony, but provides that, in the absence of personal service, the magistrate must proceed by rule to show cause against the defaulting witness. Section 11512 provides as punishment that the recalcitrant witness may be imprisoned "until he submits to be sworn, testifies or gives his deposition."

The statutory scheme of the State for taking testimony by deposition is completed by Section 11514 of the Ohio General Code, which provides that a witness committed for contempt for refusal to appear, to be sworn or to testify may immediately apply to any one of the judges of any of the courts of record of the State who may discharge the witness "if it appears that his imprisonment is *illegal*." Section 11514 thus provides a judicial review of the legality of a commitment or an attachment of a witness. *DeCamp* v. *Archibald*, 50 O. S. 618 at 626 (Section 11514 of the Ohio General Code was formerly Section 5255 of the Revised Statutes of Ohio); *Benckenstein* v. *Schott*, 92 O. S. 29 at 41. This judicial review is not a mere remedy by *habeas corpus*. Under the Ohio statutes, as at common law, the remedy of *habeas corpus* is limited to testing the *jurisdiction* of the committing authority. (Section 12165.) On the other hand, an application for release from imprisonment under Section 11514 tests not merely the jurisdiction of the committing magistrate but provides a full and free examination of the *legality* of the restraint without prejudice by reason

of any action, finding or conclusion of the committing magistrate. It was under these statutes and this statutory scheme that the plaintiff in the Common Pleas suit sought to take the testimony of the Appellant Koehrman.*

Immediately following appellant's technical arrest on the attachment issued by the notary (R. 84), and before the sheriff had an opportunity to bring him before the notary for hearing to answer for his contempt, he applied to the Court of Appeals of Lucas

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* While the absence of a similar procedure in other States would furnish no ground for criticism of the statutory scheme for the administration of justice in Ohio, it is interesting and significant to note that the statutory scheme of Ohio for the compulsion of testimony by deposition or otherwise, is identical with, substantially the same, or very similar to the corresponding statutory procedure of many other States.

Statutes in the following States are identical with Ohio General Code, Sections 11510, 11511, 11512 and 11514:

Kansas.—Revised Statutes of Kansas, 1923, Chapter 60, Sections 2812, 2813, 2814, 2815, 2823.

Nebraska.—Compiled Statutes of Nebraska, 1929, Chapter 20, Sections 1229, 1230, 1231, Chapter 60, Section 107. (No section to correspond with O. G. C., Sec. 11514.)

Oklahoma.—Oklahoma Statutes, 1931, Sections 278, 279, 280, 281, 296.

South Dakota.—Compiled Laws of South Dakota, 1929, Sections 2740, 2741, 2742, 2743, 2758.

Wyoming.—Wyoming Revised Statutes, 1931, Chapter 89, Sections 1715, 1716, 1717, 1718, 1805.

County, Ohio, for his release from imprisonment as authorized by Ohio General Code, Sec. 11514 (R. 92-102). After a full and complete review of the notary's action the Court of Appeals denied his release (R. 96, 196-200). To this judgment a writ of error was obtained from the Ohio Supreme Court and from the decision of that court affirming the Court of Appeals (R. 79-82) the appellant now prosecutes this appeal to the Supreme Court of the United States.

In the following States the corresponding statutes are substantially to the same effect as Ohio General Code, Sections 11510, 11511 and 11512.

Nevada.—Nevada Compiled Laws, 1929, Sections 8985, 8987, 8988, 9002.

Oregon.—Oregon Code Annotated, 1930, Sections 9-1109, 9-1111, 9-1112, 9-1701, 9-2201.

Utah.—Compiled Laws of Utah, 1917, Sections 7133, 7135, 7136, 4253.

The following States have adopted similar statutory schemes which permit notaries or other non-judicial officers authorized to take depositions variously to summarily issue attachments or commit witnesses who disobey subpœnas or refuse to testify:

Arizona.—Revised Code of Arizona, 1928, Sections 4419, 4426, 4427.

Arkansas.—Digest and Statutes of Arkansas, 1921, Sections 4211, 4231, 4232.

Connecticut.—General Statutes of Connecticut, Revision of 1930, Section 5589.

Florida.—Compiled General Laws of Florida, 1927, Sections 4438, 4439.

During the interim between the judgment of the Lucas County Court of Appeals and the decision by the Ohio Supreme Court, the appellant attempted the collateral remedy of *habeas corpus* in the Federal courts. That collateral proceeding has already reached this Court and was disposed of on December 12, 1932. *Kochrman* v. *Light*, October Term 1932, No. 501, certiorari denied. For a detailed description of the numerous steps taken by the appellant to avoid and delay as long as possible his duty to testify, we respectfully refer the Court to Respondent's Brief

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Iowa.—Code of Iowa, 1931, Sections 11341, 11358, 11359 and 12540 to 12551, inclusive.

Louisiana.—Marr's Revised Code of Practice of Louisiana, 1927. R. S. 615, page 361 and R. S. 618, page 362.

Maine.—Revised Statutes of Maine, 1930, Chapter 121, Sections 2 and 29.

Michigan.—Compiled Laws of Michigan, 1929, Sections 14228, 14229, 14230.

Mississippi.—Mississippi Code, 1930, Section 1535.

Missouri.—Revised Statutes of Missouri, 1929, Sections 1756 and 1773.

New Hampshire.—Public Laws of New Hampshire, 1926, Chapter 336, Sections 4 and 7.

Texas.—Vernon's Annotated Texas Statutes, Title 55, Articles 3707, 3709, 3746, 3747, 3748.

Vermont.—General Laws of Vermont, 1917, Sections 1911, 1919, 1920, 1921.

West Virginia.—Official Code of West Virginia, 1931, Chapter 57, Article 4, Section 1; Chapter 57, Article 5, Sections 5 and 6.

in Opposition to Petition for Certiorari, pp. 5-9, *Koehrman* v. *Light*, October Term 1932, No. 501.

The petition in the Common Pleas Court charges the defendants with a far-flung fraudulent conspiracy (R. 110-131). It is evident both from the objections first raised by counsel for the appellant at the commencement of the depositions and from the subsequent course followed by appellant that the real reason why appellant is now before this Court is not to procure his release from an imprisonment which he has never suffered, but to prevent a hearing before the proper officer and an adjudication as to the contempt charged and to continue, with all the means at his command, his effort to obstruct and delay the taking of depositions in the Common Pleas Court and the orderly administration of justice in the courts of Ohio. In short the real question here is not whether the appellant shall be imprisoned, but whether the appellant may avoid a hearing on the contempt charged and, if found guilty of such contempt, may be compelled to give his testimony in the State courts in accordance with the procedure provided by the State for the administration of justice. The Supreme Court of Ohio has squarely decided that the plaintiff in the Common Pleas Court is entitled, as a matter of law, justice and right, to the testimony of the appellant and other defendants prosecuting sister appeals to this Court. Nevertheless the appellant now seeks further delays by raising sham and frivolous constitutional questions in a final attempt to obtain a review in this Court.

We respectfully submit that this Court should decline jurisdiction of this appeal upon the following grounds:

I. The claims of an unconstitutional exercise of authority under the Ohio statutes sustained below are not a basis of jurisdiction on appeal.

II. The attack on the Ohio statutes providing for the compulsion of testimony raises no substantial Federal question which could warrant the exercise of jurisdiction by this Court.

And in the event appellant's statement is treated as a petition for certiorari, we respectfully submit that:

III. The claim that appellant has been deprived of his constitutional rights and immunities is frivolous and without merit.

REASONS AND AUTHORITIES MAKING AGAINST JURISDICTION.

I.

The jurisdiction of this Court to entertain this appeal is based exclusively on the holding of the Ohio Supreme Court that Sections 11510, 11511, 11512 and 11514 of the Ohio General Code are not in violation of the Federal Constitution; and the claims, were they meritorious, of an unconstitutional exercise of authority under these statutes are not a basis of jurisdiction on appeal.

Inasmuch as there is no question involved in this case of the validity of any statute or treaty of the United States, the sole ground which can be asserted

by the appellant to sustain the jurisdiction of this Court is the alleged repugnancy to the Federal Constitution of such statutes of Ohio as may have been sustained by the court below. The other claims of the appellant, assuming they could be considered as raising substantial Federal questions, do not as a matter of right entitle the appellant to an appeal, but may only be addressed to the discretion of the court on a petition for a writ of certiorari. *Judicial Code Sec. 237, 28 U. S. C. A. 344, Zucht* v. *King,* 260 U. S. 174, 177. Therefore the following contentions, irrespective of their substance, are improperly asserted as a basis of jurisdiction: (*a*) That appellant was deprived by the notary of notice and an opportunity to be heard; (*b*) That the notary was in fact disqualified on account of personal interest; (*c*) That the subpœna duces tecum served upon the appellant constituted an unreasonable search and seizure.

The appellant also apparently asserts that Sections 11497 and 11503 are unconstitutional as in violation of the Fourteenth Amendment (Appellant's Statement in Support of Jurisdiction, Section B, p. 3). While the contention is clearly without merit, it is, if advanced, being made for the first time in appellant's petition for, and assignment of errors, on this appeal. Since the claim was neither raised nor passed upon in the State courts, clearly it can furnish no basis of jurisdiction here. *Hulbert* v. *Chicago,* 202 U. S. 275, 280.

II.

The attack on the Ohio statutes providing for the compulsion of testimony raises no substantial Federal question which could warrant the exercise of jurisdiction by this Court.

To give the Supreme Court of the United States jurisdiction to review the judgment of a State court, the bare averment of a Federal question is not sufficient and if it appears that the claim of unconstitutionality is insubstantial, frivolous or fictitious, or that the appeal is prosecuted solely for delay, this Court will refuse to entertain jurisdiction, although a Federal question may in form be presented in the record. *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79, 87; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 344; *Wilson* v. *North Carolina*, 169 U. S. 586, 595; *Sawyer* v. *Piper*, 189 U. S. 154, 156; *Patterson* v. *Colorado*, 205 U. S. 454; *Parker* v. *McLain*, 237 U. S. 469, 471; *Union Pacific Railroad Co.* v. *Laughlin*, 247 U. S. 204; *Zucht* v. *King*, 260 U. S. 174, 177.

The power of the State of Ohio to require its citizens to give testimony in advance of trial in civil actions pending in its courts is not disputed by the appellant. It is only the machinery set up by the State for the carrying out of that power that is objected to. Granted the basic power of the State to enforce the duty of its citizens to testify in aid of the administration of civil justice, the particular mechanics adopted by the Legislature eighty years ago (Act of March

11, 1853, Ohio Laws, Chap. 1202, Sections 322-325) for the enforcement and administration of that basic power is a matter exclusively of internal interest and control. It should, therefore, require a case of clearly unreasonable procedural provisions to warrant the assumption of jurisdiction by the Supreme Court of the United States. *Twining* v. *New Jersey*, 211 U. S. 78, where it was stated at page 114:

> "* * * The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands."

A.

The contention that Sections 11510, 11511 and 11512, according to their terms, fail to provide for notice and an opportunity to be heard in violation of the Fourteenth Amendment is without substance or merit.

From the analysis of Sections 11510, 11511 and 11512 heretofore made (pages 3-4, *supra*), it is clear that such statutes provide that on failure of the witness to obey a subpœna personally served, the examining officer may issue an attachment commanding the sheriff to bring the recalcitrant witness before him to answer for the contempt. This is in strict accordance with every requirement of due process of law. It is well settled that where an intended witness fails to appear in obedience to process shown by the officer's return

to have been personally served, proceedings to punish for contempt may be initiated by issuance of attachment without further showing. *McGrain* v. *Daugherty*, 273 U. S. 135, 157; *Wilson* v. *State*, 57 Ind. 71, 73; *In re Steiner*, 195 Fed. 299, 302. The issuance of such an attachment and the arrest thereunder is not as a punishment for contempt, but for the purpose of initiating the proceedings and bringing the person before the court or magistrate to answer for the alleged contempt. Such process affords both notice and opportunity to be heard. There can be no question, therefore, that the above sections, so far as they apply to the attachment of the appellant, are constitutional according to their terms.

B.

The contention that the power to enforce testimony, as conferred by Sections 11510, 11511 and 11512 upon non-judicial officers, is repugnant to the Fourteenth Amendment, is an attempt to reopen a question settled beyond dispute and is wholly without foundation.

The further contention of the appellant that the notary, being a non-judicial officer, is without power to issue an attachment for the purpose of enforcing the attendance of a witness and initiating a contempt proceeding and that therefore the statutes violate the due process clause, is merely the old argument, somewhat refurbished, that a State may not delegate its enforcement powers to non-judicial officers and that due process requires judicial process. That such an argument is no longer tenable is beyond dispute. *Carfer, Sheriff*, v. *Caldwell*, 200 U. S. 293, 297; *Reetz*

v. *Michigan*, 188 U. S. 505, 507; *Dreyer* v. *Illinois*, 187 U. S. 71, 84.

However, this appellant, who refused to appear in response to his subpœna and to whom, therefore, no questions were put, can raise no question whether the exercise by a notary of the power to determine whether questions put to a witness are lawful and to commit for contempt for refusal to answer lawful questions, denies due process under the Federal Constitution. However, were such a question properly raised by the appellant, as it is not, it would clearly be without merit.

The bald and unsupported statement of appellant that the question as to whether the witness should be imprisoned is left to the uncontrolled will of the notary (Appellant's Statement Disclosing the Basis of Jurisdiction, Sec. D, pages 7-8) is in the teeth of the express wording of Sections 11510, 11512, which limits the examining officer's power and jurisdiction to commitments as specifically defined in the statutes. Thus there is no question here of the conferring of an arbitrary, despotic or unlimited power upon an officer of the State. The possibility that either a court or officer may err has never been held to make it unconstitutional to vest either with power. Nor do the Ohio decisions support the claim that a notary is without power to determine whether a contempt, as defined by the statute, has been committed. The fact is that the examining magistrate, whether a notary public or a judge (and he may be either under Section 11529), does not have power to pass upon whether the evidence taken on the deposition shall be admissible as between

the parties to the action on the trial of the cause, that determination being reserved for the judge presiding over the trial. However, the examining magistrate, whether a notary public or a judge, does have the power to determine whether the witness has committed a contempt and to enforce the giving of his testimony on the deposition. *DeCamp* v. *Archibald*, 50 O. S. 618, 625; *Ex Parte Jennings*, 60 O. S. 319, 328; *Ex Parte Woodworth*, 6 Ohio Decisions 19, 21; 14 Ohio Jurisprudence 38; *Benckenstein* v. *Schott*, 92 O. S. 29. This is a familiar rule in Federal practice. *Nelson* v. *United States*, 201 U. S. 92, 114; *Dowagiac Mfg. Co.* v. *Lochren* (8 C. C. A.), 143 Fed. 211, 215.

C.

While the full, free and untrammelled judicial review provided by Section 11514 is not necessary to afford due process, it is clear that the provision of such right of review can not violate the Fourteenth Amendment, as appears to be alleged by appellant's statement in support of jurisdiction, but that it merely further evidences the care of the State to safeguard every legitimate right of a witness.

The appellant includes Section 11514 as one of the statutes claimed to be unconstitutional. (Appellant's Statement in Support of Jurisdiction, Sec. B, p. 3.) It is settled that a right of appeal or review is not an essential element of due process. *Reetz* v. *Michigan*, 188 U. S. 505, 508. We have already seen that jurisdiction and power to attach and punish for contempt, as defined in the statute, have been lawfully conferred upon

a notary public. The provision for a review not merely of his jurisdiction but of the legality of his action was not essential to due process, but it does demonstrate the care with which the State has safeguarded every legitimate right of a witness. The appellant objects that this review does not precede his attachment to answer for the contempt charged. (Appellant's Statement in Support of Jurisdiction, Sec. D, p. 8.) We know of no principle that when power is lawfully conferred upon any officer it may not be exercised until his proposed action has first been reviewed by a court. The appellant's contention here is not merely that an officer authorized to compel attendance and testimony may not issue a writ of attachment to initiate contempt proceedings for disobedience of a subpoena shown to have been personally served, without a preliminary hearing voluntarily attended by the recalcitrant witness (shown to be wholly without merit at page 8, *supra*), but that such an officer under such circumstances may not issue a writ of attachment to initiate such contempt proceedings without a previous adjudication by a court. The mere statement of the contention refutes it.

However, the existence of this full, free and untrammelled review by application to any court of record in the State of Ohio does emphasize the reasonableness of the statutory scheme of Ohio for taking testimony by deposition in civil causes and does furnish a prompt and efficacious remedy for any error of the examining officer.

III.

If appellant's "statement disclosing the basis of jurisdiction" be considered by this Court as a petition for a writ of certiorari, the claim that appellant has been deprived of his constitutional rights and immunities is frivolous and without merit.

A.

The proceedings before the notary and the commitment of appellant did not deny him due process of law.

The constitutionality of the statutory scheme provided by Sections 11510, 11511 and 11512 with respect to the requirements of notice and opportunity for hearing has already been shown, *supra*, at page 12. The action of the notary was in strict conformance to those sections and satisfied every requirement of due process of law. The appellant suggests that neither he nor his counsel received notice or were given an opportunity to be heard before the notary issued the writ of attachment and apparently complains because the notary did not first hold a hearing to determine whether appellant's disobedience of the subpœna shown to be personally served upon him constituted contempt, before the notary initiated, by issuance of the writ of attachment, the proceedings looking to such a hearing and to such a determination. (Appellant's Statement Disclosing the Basis of Jurisdiction, Sec. D, p. 8.) The issuance of the writ of attachment initiated the proceeding for a hearing. The appellant refused such hearing and prevented it by untimely

resort to the courts. He can base no rights on the absence of a hearing he thus prevented and refused to have. The contention that a writ or warrant of arrest may not be signed or issued except upon additional notice to and in the voluntary presence of the person sought to be arrested is manifestly absurd.

Furthermore, in the instant case the appellant has had the benefit of a full, free and untrammelled review, pursuant to the provisions of Section 11514, by one of the State Courts of Appeals of Ohio and by the Supreme Court of Ohio and both courts have found that the examining officer proceeded in strict compliance with the law. Were such review essential, as it is not, it would properly be considered in determining the adequacy of the due process provided by the State. *Frank* v. *Mangum*, 237 U. S. 309, 327.

B.

The suggestion that the record discloses a disqualifying pecuniary interest of the notary is without basis in fact or law; but were such disqualifying interest assumed to exist, the record would establish both that it was waived by the appellant and cured by the subsequent review.

The notary had no disqualifying interest in fact. It was so found by the Supreme Court of Ohio. (R. 80, 91.) He is an official of the State, appointed for the express purpose of presiding at the taking of depositions, and it can no more be said that he is in the employ of the party calling upon him than that a judge to whom is submitted an application for a writ of

habeas corpus or a motion for a restraining order is in the employ of the applicant therefor. The appellant, through his counsel, ordered copies of the transcription (R. 160) and thus the "employment," if any, was mutual.

Moreover, this witness never appeared in response to the subpœna, and it is unknown whether, had he testified, his testimony would have been taken down by the notary or some other disinterested person under Section 11537 of the Ohio General Code. However, on the assumption that under the usual practice the testimony would have been taken down, in the absence of objection, by the notary, there would be no disqualification in fact. In such circumstances, the notary would be compensated in any event for the services actually performed; and his compensation for such services would be no greater and no less whether or not he commits the witness. The suggestion that the length or extent of his services might be affected is fanciful and sustained by no authority. This contention was first raised by appellant in his Amended Application to the State Court of Appeals (R. 107-109, 160). Counsel appeared on behalf of the appellant before the notary at the taking of the depositions when appellant refused to appear in response to his subpœna. Hence, if the disqualification had in fact existed, it would be waived by failure of appellant's counsel to object. *State ex rel. Bowman* v. *Commissioners*, 124 O. S. 174; *Tari* v. *State*, 117 O. S. 481. But if a disqualification were assumed to exist and not to have been waived, it would not have deprived the

notary of jurisdiction; and the subsequent hearing on the merits by a disinterested court under Section 11514 sought and obtained by the appellant, would have cured any such supposed defect and satisfied every requirement of due process of law. *Ex parte Meeks*, 20 Fed. (2d) 543; *Tari* v. *State*, 117 O. S. 481; *Hill* v. *State*, 174 Ark. 886, 298 S. W. 321; *Hitt* v. *State*, 149 Miss. 718, 115 So. 879; *Ex parte Lewis*, 288 Pac. 354 (Okla. 1930); *Brooks* v. *Town of Potomac*, 149 Va. 427, 141 S. E. 249.

C.

The contention that the subpœna duces tecum, as an unreasonable search and seizure, violated the fourteenth Amendment, is clearly untenable.

The subpœna *duces tecum* as found by the Supreme Court of Ohio (R. 80, 90.) does not constitute an unreasonable search and seizure in view of the broad scope and ramifications of the fraudulent conspiracy and the fraudulent misrepresentations set forth in the petition in the Common Pleas Court. The same view was taken by the State Court of Appeals (R. 198). However, even if the contrary be assumed for the sake of argument, it is clear that no Federal question is thereby presented. The personal rights, privileges and immunities set forth in the first eight Amendments of the Federal Constitution, including the safeguard against unreasonable searches and seizures provided in the Fourth Amendment, are not within the "privileges and immunities" covered by the Fourteenth Amendment. *Twining* v. *New Jersey*, 211 U. S.

78, 98, 99. And therefore an unreasonable search and seizure may be made by a State officer under State authority without violating the Federal Constitution. *Weeks* v. *United States*, 232 U. S. 383.

We respectfully submit that the record presents no substantial Federal question which would warrant this Court in taking jurisdiction and that the appeal has been taken for delay to frustrate the exercise of valuable rights by the Common Pleas plaintiff. Any further delay subjects the Common Pleas plaintiff to the hazard if not probably to the loss of essential evidence. Under these circumstances justice as well as law requires a prompt refusal of jurisdiction.

Respectfully submitted,

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APPENDIX A.

Sections of the General Code of Ohio Involved, Cited or Discussed.

"Sec. 11497. *Corporations; officers may be examined.*—At the instance of the adverse party, a party may be examined as if under cross examination, either orally, or by deposition, like any other witness. If the party be a corporation, any or all the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded but may rebut it by a counter testimony" (R. S., Sec. 5243).

"Sec. 11502. *Subpœna on taking depositions.*—When the attendance of a witness before an officer authorized to take depositions is required, the subpœna shall be issued by such officer" (R. S., Sec. 5248).

"Sec. 11503. *What subpœna to contain.*—A subpœna shall be directed to a person named therein, and require him to attend at a specified time and place to testify as a witness. It also may direct the person it names, to bring with him any book, writing, or other thing under his control, which he may be compelled to produce as evidence" (R. S., Sec. 5247).

"Sec. 11504. *Service of subpœna.*—A subpœna may be served by the sheriff, coroner, or any constable of the county, by the party, or other person; but if service is not made by a sheriff, coroner or constable, proof of it shall be shown by affidavit, and no costs shall be taxed" (R. S., Sec. 5246).

"Sec. 11510. *Contempt of court.*—Disobedience of a subpœna, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal to answer as a witness or to subscribe a deposition,

may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required" (R. S., Sec. 5252).

"SEC. 11511. *When attachment may issue.*—When a witness fails to obey a subpœna personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, an attachment, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his appearance, which sum shall be indorsed on the back of the writ, except that, if no sum be so indorsed, it shall be one hundred dollars. When the witness was not personally served, the court, by a rule, may order him to show cause why an attachment should not issue against him" (R. S., Sec. 5253).

"SEC. 11512. *Punishment for contempt.*—Punishment for the acts of contempt specified in Section eleven thousand five hundred and ten shall be as follows: When the witness fails to attend in obedience to a subpœna, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition" (R. S., Sec. 5254).

"SEC. 11514. *How witness released from imprisonment.*—A witness so imprisoned by an officer may apply to a judge of the supreme court, court of appeals, common pleas or probate court, who may discharge him, if it appears that his imprisonment is illegal" (R. S., Sec. 5255).

"SEC. 11521. *How testimony taken.*—The testimony of witnesses may be taken:

1. By affidavit;
2. By deposition;
3. By oral examination" (R. S., Sec. 5261).

"SEC. 11525. *When deposition may be used.*—The deposition of a witness may be used only when it is made to appear to the satisfaction of the court that he does not reside in, or is absent from, the county where the action or proceeding is pending, or, by change of venue, is sent for trial; or that he is dead, or, from age, infirmity, or imprisonment, is unable to attend court; or that the testimony is required upon a motion, or where the oral examination of the witness is not required" (R. S., Secs. 5265, 5281).

"SEC. 11526. *What deposition taken.*—Either party may commence taking testimony by deposition at any time after service upon the defendant" (R. S., Sec. 5266).

"SEC. 11529. *Officers authorized to take depositions.*—Depositions may be taken in this state before a judge or the clerk of the supreme court, a judge or clerk of the court of appeals, a judge or clerk of the court of common pleas, a probate judge, justice of the peace, notary public, mayor, master commissioner, official stenographer of any court in this state, or any person empowered by a special commission" (R. S., Sec. 5269).

"SEC. 11534. *Notice to take deposition.*—Written notice of the intention to take a deposition shall be given to the adverse party, except in cases in which it is to be taken under a special commission, and shall specify the action or proceeding, the name of the court or tribunal in which the deposition is to be used, and the time when and place where it will be taken. In

case the deposition of a party to the suit be taken, it shall not be used in his own behalf, unless the notice specified that his deposition would be taken" (R. S., Sec. 5273).

"SEC. 11535. *Service of notice.*—Such notice must be served upon the adverse party, his agent or attorney of record, or left at the usual place of abode of such party or his agent. The deposition shall only be used against such parties as are served with notice in one of the modes prescribed. It also must be served so as to allow the adverse party time, exclusive of Sundays, the day of service, and one day for preparation, to travel by the usual routes and modes of conveyance to the place named in the notice. If so stated in the notice, the examination may be adjourned from day to day" (R. S., Sec. 5273).

"SEC. 11537. *By whom deposition written.*—The deposition must be written in the presence of the officer before whom it is taken, either by the officer, the witness, or some disinterested person, and subscribed by the witness" (R. S., Sec. 5275).

"SEC. 12165. *When writ not allowed.*—If it appears that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate *had jurisdiction to issue the process,* render the judgment, *or make the order, the writ shall not be allowed;* or, if the jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment, or order" (R. S., Sec. 5729). (Italics ours.)